

REMARKS

Reconsideration and withdrawal of the rejections of the application is respectfully requested in view of the remarks and enclosures herein.

THE ART REJECTIONS ARE OVERCOME

Claims 15-17, 19 and 23 were rejected under 35 U.S.C. §102(b) as allegedly anticipated by Gurian (U.S. 5,865,005). Claims 20-21 and 24 were rejected under 35 U.S.C. §103(a) as being allegedly unpatentable over Gurian in view of Robinson (U.S. 2002/0069904). Claims 15-16, 19 and 23 were rejected under 35 U.S.C. §103(a) as being allegedly unpatentable over Clarke (U.S. 6,258,455). Additionally, claims 20-21 and 24 were rejected under 35 U.S.C. §103(a) as being allegedly unpatentable over Clarke in view of Newman (U.S. 6,000,057). The rejections are respectfully traversed and will be addressed in turn.

Initially, it is respectfully stated that the rejections are inconsistent with each other, with the first Section 103 rejection based on Gurian clearly showing that the Section 102 rejection based on Gurian cannot stand.

More specifically, it is respectfully submitted that a two-prong inquiry must be satisfied in order for a Section 102 rejection to stand. First, the prior art reference must contain all of the elements of the claimed invention. *See Lewmar Marine Inc. v. Barient Inc.*, 3 U.S.P.Q.2d 1766 (Fed. Cir. 1987). Second, the prior art must contain an enabling disclosure of the claimed invention. *See Chester v. Miller*, 15 U.S.P.Q.2d 1333, 1336 (Fed. Cir. 1990). It is respectfully asserted that Gurian fails both prongs of this test.

The Office Action admits on page 4, in discussing the first Section 103 rejection, that Gurian “fails to disclose that the fabric can be [an] odor-reducing fabric.” Hence, it is respectfully submitted that the Section 102(b) is *prima facie* erroneous. That is, it is respectfully submitted that the Office Action, by its very terms, demonstrates that the Section 102(b) rejection is clearly erroneous. If Gurian does not teach that the fabric may be an odor-reducing fabric, as is required by each of the pending claims (not just those claims rejected under §103), Gurian fails to teach each and every element of the claimed invention. Accordingly, the Section 102 rejection is improper and must be withdrawn.

Furthermore, the Office Action alleges that Gurian “teaches a yarn with base filaments formed of a plurality of the permanently flame-retardant filaments and a pair of effect filaments

– one of the plurality of permanently flame-retardant filaments and one of the plurality of permanently anti-microbial filaments.” Office Action at 2-3. As is evident by the Figures of Gurian, specifically Figure 1, the yarn of Gurian results in a “boucle” effect. This results in both the core yarn and the outside yarn showing on the surface of the fabric. As Gurian’s fabric is to be both flame-retardant and anti-microbial, it is intuitive that both fibers would need to be present on the surface of the fabric for their properties to be evident. In the present invention, this is not the case. The fabric of the present invention is an odor-reducing fabric only. Therefore, it is intuitive that to obtain the greatest odor-reducing capabilities, the antimicrobial agent should have the greatest possible presence on the surface of the fabric, which is obtainable by wrapping the acetate fiber having blended therein an antimicrobial agent entirely around the polyester fiber, as is what occurs during the making of the yarn used in the present invention. This type of yarn has different characteristics than the “boucle” yarn, and thus different fabrics would be made from each. Accordingly, the fabric of Gurian, made with a “boucle” yarn is not the same as the fabric of the present invention.

Yet further still, as stated in the Communication filed January 15, 2004, the Gurian patent discloses and claims a “permanently flame-retardant and anti-microbial air-textured yarn” wherein the yarn is comprised of 0-60% by weight of said anti-microbial filaments and 40-90% by weight of said flame-retardant filaments” (column 6, lines 45-46 and lines 58-60, emphasis added). Gurian also discloses and claims a fabric comprising such yarn, and comprising “at least 5% by weight of said anti-microbial filaments (column 6, lines 65-67). Further, Gurian discloses that the “anti-microbial filaments . . . are preferably formed of cellulose acetate” and that the “flame-retardant filaments are preferably formed of an inherently flame-retardant polyester available under the tradename TREVIRA FR” (column 4, lines 16-17 and lines 31-33).

However, the examples in Gurian describe only a single example of a yarn and two fabrics, wherein the yarn is comprised of 79.26% polyester and 20.74% cellulose acetate, and the fabrics were comprised of 94% fire-retardant polyester and 6% anti-microbial acetate or 91% flame-retardant polyester and 9% anti-microbial acetate (column 5, lines 51-53 and column 6, lines 3-5 and lines 16-18).

The instant claims are drawn to a knit or woven fabric comprising at least 25% by weight of an acetate fiber having blended therein an antimicrobial agent. The Office Action states that the “at least 5% by weight” of Gurian would include the “at least 25% by weight” of the present

invention. However, it is respectfully submitted that Gurian is not enabled for a fabric comprising at least 25% by weight of antimicrobial filaments.

Acetate is known to be a highly flammable material (see Facts About Fabric Flammability, from www.extension.iastate.edu/Publications/NCR174.PDF, attached here as Exhibit 1). Acetate is a manufactured cellulosic fiber that “burn[s] with a yellow flame, light smoke, and have glowing embers – like a fireplace log, only much faster” (see Facts About Fabric Flammability, indicated passages on pages 3 and 4).

Accordingly, an increase in the percent by weight of the acetate in the fabric of Gurian, i.e., up to 25% by weight, would likely lead to the loss of flame-retardant properties of the fabric. In fact, Gurian’s fabrics are manufactured by his employer, DesignTex (see Textile Guru by Celeste Pennington, attached as Exhibit 2). DesignTex’s website contains the specifications for various products, including the flame-resistant and anti-microbial fabrics for use in hospital cubicle dividers and draperies (see Cubicle and Drapery specification pages, attached as Exhibit 3). In **no instance** does DesignTex manufacture or sell a flame-resistant and anti-microbial fabric that contains **more than 11% acetate**.

Again, for a rejection under section 102 to stand, the cited reference must contain all of the elements of the claim, and it must have an enabling disclosure. From the discussion set forth above regarding the percentage of acetate present in products produced using the Gurian patent, and from the discussion of the flammability of acetate, it is respectfully submitted that the Gurian patent does not provide enablement for an acetate content of at least 25%. In fact, any such fabric of Gurian’s made with at least 25% acetate would likely fail the flame-retardant requirements set forth in Gurian, showing that an acetate content of at least 25% would render Gurian’s fabric non-operable.

Consequently, for all of the reasons set forth above, reconsideration and withdrawal of the rejection under 35 U.S.C. §102(b) based on Gurian is respectfully requested.

Turning to the Section 103 rejection based on Gurian in view of Robinson, it is respectfully submitted that the discussion of Gurian above is equally applicable to this rejection. Gurian does not teach an “odor reducing fabric” and Gurian is not enabled for a fabric containing 25% acetate. Accordingly, in order for the 103 rejection to be proper, Robinson would have to remedy these deficiencies. It is respectfully submitted that Robinson, in fact, does not.

The odor-reducing enclosure of Robinson encompasses a plurality of layers of fabric, one of which may include an “odor mitigating fabric.” Office Action at 4. This is substantially different from the present invention, which utilizes the blended polyester and acetate fibers to provide odor-reducing properties into the entire fabric, not into one of many layers of fabric. Simply, combining Gurian with Robinson would merely result in a layer of an anti-microbial fabric in conjunction with other fabric layers. One would not arrive at the odor-reducing woven or knit fabric of the present invention comprising a polyester fiber and an acetate fiber having blended therein an antimicrobial agent, wherein the acetate fiber is at least about 25 % by weight of the fabric.

Furthermore, as discussed above, due to the flammability of acetate, one of skill in the art would have no motivation to modify Gurian to obtain flame-resistant and anti-microbial fabrics containing 25% by weight of an acetate fiber. The addition of Robinson does not remedy this deficiency; accordingly, one who combines Gurian and Robinson does not arrive at the present invention.

Furthermore, the Office Action states that no patentable weight has been given to “an odor-reducing hunting garment” as recited in claim 20. The Office Action cites *Ex parte Masham* for the premise that a “recitation with respect to the manner in which a claimed article is intended to be employed does not differentiate the claimed article from a prior article satisfying the claimed structural limitations.” Office Action at 4. Applicants disagree with this argument. First, in *Masham*, the devices in question were substantially similar, with the only difference being the amount of developer used in the chamber. Accordingly, the Board stated that because the device in question could be used in the manner of the other, i.e. by using more developer in the chamber, there was no differentiation between the prior art apparatus and the structural limitations of the claimed apparatus. In this instant case, the present invention, an odor-reducing fabric and an odor-reducing hunting garment, is substantially different from the odor-inhibiting enclosure of Robinson. An enclosure that must be able to be disassembled and reassembled and provide shelter from the elements is structurally very different from an article of clothing which must be able to move with the wearer, survive cleanings, and provide a certain level of comfort to the wearer. For instance, the multilayered fabric of Robinson would likely be too thick and stiff to be used adequately in a garment.

Therefore, it is respectfully submitted that the recitation "an odor-reducing hunting garment" should be given patentable weight. Furthermore, as the Office Action admits that garments are outside the scope of Robinson, the rejection of the claims based on Gurian and Robinson should be withdrawn.

Since Robinson provides no motivation to modify Gurian to achieve the present invention, and because Gurian contains deficiencies that are not remedied by Robinson, Applicants verily believe that the present invention is patentable over Gurian, either alone or in combination with Robinson. Accordingly, reconsideration and withdrawal of the Section 103 rejection based on Gurian in view of Robinson is respectfully requested.

As to the section 103 rejection over Clarke alone (as described in part 5 of the Office Action), it is respectfully submitted that the rejection is improper. The next sequential section 103 rejection described in the Office Action utilizes Clarke in view of Newman, and admits that "Clarke teaches the claimed invention above except fails to teach that the fabric is an odor-reducing fabric, or specifically an odor-reducing hunting garment." In other words, the Office Action admits that Clarke is deficient and does not teach the present invention, and attempts to correct these deficiencies through Newman. However, if the Office Action admits that a second reference is needed to correct the deficiencies of Clarke, as it does here, this is tantamount to stating that Clarke cannot stand as a rejection on its own, which is in contrast to the rejection actually present in the Office Action. The Office Action uses Newman in combination with Clarke only for the rejection of claims 20, 21 and 24. Clarke alone is the basis of the rejection of claims 15, 16, 19 and 23. This is improper, however, as all of the claims are directed to an odor-reducing fabric which the Office Action admits is not taught by Clarke. Therefore, the rejection of any of the pending claims under Section 102 in view of Clarke is improper.

Additionally, Clarke does not provide the motivation to one of skill in the art that would be required to modify Clarke to arrive at the present invention. Clarke relates to an antimicrobial material having at least one yarn having fine fiber of 1.0 denier or less, wherein the material is to be used for cleaning.

Clarke is directed towards the use of microfibers, those that are 1.0 denier or less. The present invention does not utilize microfibers, nor would microfibers be useful in the present invention. And, vice versa, neither would the larger fibers of the present invention be useful in Clarke. The suggestion that one could take any teaching relating to microfibers and transfer it to

larger fibers is similar to attempting to say that metal is metal, regardless of the specific type, and that it may be used interchangeably. This is quite obviously not the case, as no one would want use aluminum to make a building supports typically made of steel. The difference between microfibers and larger fibers is not limited to the differences in the physical size of the fiber. Rather, microfibers have unique characteristics that are not shared by larger fibers, and vice versa. Microfibers provide an extremely absorbant material which has a soft and silky feel. These fibers would not be useful in the present invention, where the use as a hunting garment requires a fabric that will not be highly absorbant and wherein strength and stability will be of great importance. Therefore, the extreme differences in the qualities of microfibers and other fibers would provide no incentive for one to modify the fabric of Clarke to arrive at the present invention.

Additionally, Clarke does not provide any motivation to modify the cleaning material described therein to arrive at the odor-reducing material of the present invention; the reduction of odor is not considered by Clarke. Accordingly, for this reason as well, the rejection should not stand. Therefore, reconsideration and withdrawal of the Section 103 rejection based on Clarke is respectfully requested in view of the discussion herein.

Regarding the Section 103 rejection over Clarke in view of Newman, Applicants maintain that Clarke is deficient as described above. Additionally, it is respectfully submitted that Newman does not remedy the deficiencies of Clarke.

As described above, Clarke fails to teach that the fabric is an odor-reducing fabric, or specifically an odor-reducing hunting garment.

Newman describes and claims "hunting apparel comprising an article of clothing constructed with an inner layer of an antimicrobial fabric and outer layer of an odor-absorbing material."

The Office Action states that "[i]t would have been obvious to one of skill in the art . . . to use the material of Clarke as the inner layer of fabric in the odor preventing hunting apparel of Newman." Office Action at 7.

First, Applicants respectfully submit that one of skill in the art would have no motivation to combine a fabric made for cleaning with a hunting garment. Second, Applicants respectfully submit that such a combination would not result in the present invention. Such a combination would only provide a multilayered fabric, where a single layer had antimicrobial properties.

Such a combination would not provide an odor-reducing woven or knit fabric comprising apolyester fiber and acetate fiber having blended therein an antimicrobial agent, wherein the polyester and acetate fibers are entwined.

Additionally, as discussed in the Information Disclosure Statement filed January 20, 2004, inventor Newman appears to maintain that his patent covers the Contain™ line of clothing. Although Applicants dispute this contention, as discussed in the Information Disclosure Statement, enclosed herewith are test results obtained by an independent testing agency that show that the fabric of the present invention is more successful at reducing odor than is the Contain™ fabric.

Specifically, attached as Exhibit 4 are two bar graphs showing the results from two individual tests. In each test, a single individual wore a garment wherein half of the garment was made with fabric conforming to the present invention (Ab-Scent Jersey), and the other half of the garment was made of fabric alleged to be covered by the Newman patent (Contain Jersey). Pouches containing odor-absorbing material were placed under each arm of the garment, and after the garment was worn for a period of time, the pouches were removed and tested to determine the amount of odor which permeated the garment. In both tests, the fabric of the present invention greatly reduced the odor emitted when compared to the alleged Newman fabric. Accordingly, the present invention provides significantly surprising and superior results over the alleged fabric of Newman.

Consequently, one would not be motivated to combine Clarke and Newman, and even if one did, the combination would not result in the superior fabric of the present invention. Therefore, reconsideration and withdrawal of the Section 103 rejection over Clarke in view of Newman is respectfully requested.

REQUEST FOR INTERVIEW

If any issue remains as an impediment to allowance, prior to issuance of any paper other than a Notice of Allowance, an interview, is respectfully requested, with the Examiner and his supervisor, and, the Examiner is respectfully requested to contact the undersigned to arrange a mutually convenient time and manner for such an interview.

CONCLUSION

In view of the remarks herewith and those of record, the application is in condition for allowance. Favorable reconsideration of the rejections of the application and prompt issuance of a Notice of Allowance are earnestly solicited. The undersigned looks forward to hearing favorably from the Examiner at an early date.

Respectfully submitted,

FROMMER LAWRENCE & HAUG LLP
Attorneys for Applicant

By:


Thomas J. Kowalski

Reg. No. 32,147

Grace L. Pan

Reg. No. 39,440

Tel. (212) 588-0800

Fax (212) 588 0500